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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ANTHONY McFARLAND, Defendant and Appellant.	A132808 (San Mateo County Super. Ct. No. SC068427)

Gregory Anthony McFarland (appellant) appeals from a judgment of conviction entered after a jury found him guilty of two counts of assault with a firearm (Pen. Code, § 245,[1] counts 1 and 2), unlawful possession of a firearm (§ 12021, subd. (c)(1), count 3), and first degree burglary (§ 460, subd. (a), count 5), and found true the allegation that appellant personally used a firearm in the commission of those offenses (§ 12022.5, subd. (a)). Appellant contends the trial court erred by failing to conduct a hearing to investigate possible jury misconduct. We reject the contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 19, 2009, an amended information was filed charging appellant with two counts of assault with a firearm (§ 245, counts 1 and 2), unlawful possession of a firearm (§ 12021, subd. (c)(1), count 3), criminal threats (§ 422, count 4) and first degree burglary (§ 460, subd. (a), count 5). The amended information further alleged that

[1] All further statutory references are to the Penal Code unless otherwise stated.

appellant personally used a firearm in the commission of counts 1, 2, 4 and 5 (§ 12022.5, subd. (a)).

The charges stemmed from an incident that occurred on March 25, 2009.[2] That night, Arnold Celzo, Roderick Arce, Delon Johnson and Frank Medias were socializing in Celzo's mother's garage. A number of other people, including Celzo's mother, wife and young children, were inside the house. At about 12:15 a.m., two black men entered the open garage. The taller of the two men (the tall man) said, " 'What's up,' " to Johnson and Medias, and they greeted each other. As the tall man approached Celzo and Arce, Arce asked Celzo, " 'Do you know this person?' " When Celzo replied that he did not, Arce knew something was wrong and said, " 'Oh shit.' " Celzo, who was trained in martial arts, took a martial arts stance, "ready for anything to happen." The tall man said, "What's up, nigga?", pulled out a semiautomatic handgun and pointed it at Arce.

Arce ducked and ran out of the garage to call the police. Celzo put the tall man in a wrist lock and pinned him against a refrigerator. As Celzo grappled with the tall man, the other intruder asked Celzo to let the tall man go because they had gone to the " 'wrong house.' " Celzo was "begging for [the tall man] not to shoot," and the tall man responded, " 'I'm going to kill you.' " The other witnesses did not hear the tall man make such a threat. Celzo continued to place pressure on the tall man's wrist until the tall man's grip on the gun loosened. When Johnson said, " 'I got the gun,' " both intruders fled.

The police arrived shortly thereafter and Johnson gave the gun to the police. The police searched for the intruders and found appellant climbing the fence in the backyard of a residence that was three-tenths of a mile away from Celzo's mother's house. At trial, Celzo, Arce and Johnson identified appellant as the tall man who had entered the garage and pointed a weapon at them. The prosecution's expert found a "single source male

[2] Because the issue raised on appeal does not require an extensive summation of the evidence adduced at trial, we will provide a brief summary of the incident that led to the filing of the information.

profile" on the gun that matched appellant's DNA profile. The defense's expert found DNA from more than one individual on the gun and found the results were inconclusive.

A jury found appellant guilty of counts 1, 2, 3 and 5 and found the firearm use allegation true as to those counts. The trial court sentenced appellant to a total of 10 years and four months in state prison.

DISCUSSION

Background facts

On the third day of jury deliberations, the trial court received a note from Juror No. 2 stating: "Yesterday, May 24, 2011, near the end of the deliberation process a juror called into question my integrity regarding my ability to be an impartial juror based on the fact that the defendant and I have the same skin color. The juror wanted to be sure that I was not bias[ed] toward the defendant based on ethnicity. [¶] During the jury [selection] process, the defense attorney already asked that question and I found it offensive then and I found it offensive now. Not one non-black juror has been asked a question regarding prejudice against the defendant based on skin color. What makes me different? I respectfully ask for guidance regarding why during the final stage of this process an individual can continue to question my impartiality based on skin color?"

After receiving the note, the trial court conferred in chambers with counsel. The court then stated on the record, "What I intend to do is bring the jury in and read back just a portion of CALCRIM 3550 indicating that I've received a note from one of the jurors and then I'll send them back out again. Is there anything anybody wants to say for the record?" Defense counsel asked, "Did you want to indicate what—the issues that were raised in the note?" When the court responded that the note was going to be part of the record, counsel stated, "But the juror—okay. And I have informed my client what's been said in those notes." The court stated, "So . . . we're going to try this method and see what happens and see if we can go any further. Let's bring the jury out . . . ."

When the jury returned, the court stated, "Good morning. I received a note from one of the jurors; so in response to that, I know that you have several copies of the jury instructions back in the back, but I'm just going to reread a portion of one of the

instructions just to remind you. All right. [¶] This is CALCRIM 3550. It is your duty to talk with one another and deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. [¶] Do not hesitate to change your mind if you become convinced that you are wrong, but do not change your mind just because other jurors disagree with you. Keep an open mind and openly exchange your thoughts and ideas about the case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. [¶] Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other." The court sent the jury to deliberate further. Later that day, the jury returned its verdicts.

Discussion

Criminal defendants have a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) A trial court may discharge a juror and replace him or her with an alternate if the court finds the juror is "unable to perform his or her duty." (§ 1089.) A juror's "actual bias," for example, "which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge. . . ." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

"Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged. [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) However, "not every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland* (2001) 25 Cal.4th 466, 478; see also *People v. Beeler* (1995) 9 Cal.4th 953, 989 ["a hearing is not required in all circumstances"].) " 'As our cases make clear, a hearing is required only where the court

possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citation.]' [Citation.]" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478; see also, e.g., *People v. Espinoza*, *supra*, 3 Cal.4th at p. 821 [no hearing required absent evidence juror was actually asleep during trial]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required absent evidence juror's derogatory remark reflected bias against the defense as opposed to impatience with the proceedings].)

Moreover, "California courts have recognized the need to protect the sanctity of jury deliberations." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 475.) "Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id.* at p. 476.) "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.]" (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

Assuming, without deciding, that appellant did not forfeit his claim by failing to request a hearing below, we conclude the contention is without merit. Juror No. 2 clearly set forth his or her concerns in the note—that he or she "found it offensive" that defense counsel during voir dire, then later a fellow juror during deliberations, "wanted to be sure that [he or she] was not bias[ed] toward the defendant based on ethnicity." Thus, the court had sufficient information from which to determine the issue that needed to be addressed, and no further investigation was necessary.

Appellant asserts the court should have, "at a minimum," questioned Juror No. 2 and the "offending juror" because the note showed there was a "strong possibility" of juror misconduct in the form of "racial bias and improper pressure on a juror." However, Juror No. 2 did not accuse the fellow juror of racism or coercion and did not ask to be discharged or have the fellow juror discharged. Rather, he or she simply expressed his or her offense at defense counsel and the fellow juror's inquiry and asked the court for

guidance. " 'Jurors may be expected to disagree during deliberations, even at times in heated fashion.' " (*People v. Keenan*, *supra*, 46 Cal.3d at pp. 540, 541 [a juror's comment to the lone holdout juror that he was going "kill" her unless she changed her vote was "but an expression of frustration, temper, and strong conviction against the contrary views of another panelist"].) Juror No. 2's note did not put the court on notice that there was reason to believe the fellow juror was biased against appellant on racial grounds or was improperly attempting to coerce Juror No. 2 into voting guilty by invoking race. Under these circumstances, the court reasonably determined that the best way to initially address the issue was to remind the jurors, through CALCRIM 3550, to "[k]eep an open mind," "openly exchange [their] thoughts and ideas about the case," "treat one another courteously," and "to not change [their] mind[s] just because other jurors disagree with you." There was no abuse of discretion.

Disposition

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.